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No. 86-1079

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEPHEN A. KOCZAK, et al.,

Appellants,

v.

G. DALLAS DIXON, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Amicus Curiae

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INTEREST OF AMICUS CURIAE

The interests of the authors of this Amicus Curiae brief are that they received Bachelor of Arts degrees from Princeton University, where they studied under the same educational system under which John Witherspoon, sixth President of Princeton University (1767-1794), taught James Madison, (Class of 1771 and later fourth President of the United States.) James Madison returned to Princeton University in 1772 to read Theology and Ethics, among other things, under the President's supervision. See Princeton University Library Chronicles, Vol. 22, No.3, Spring, 1961, from an article by James H. Smylie, "Madison and Witherspoon: Theological Roots of American Political Thought," at p. 120. Princeton alumnus Madison was one of the principal authors of the United States Constitution and the preeminent

authority of his day on Article I, Section 4, Clause 1, the "Times, Places and Manner" Voting Clause, which is the crux of this case.

Whereas the authors of this brief have studied the law and have profound respect for it, they wish to explain succinctly what they believe to be the intention of Madison in making his authorship contribution to the U.S. Constitution, which they trust will be helpful to this Honorable Court in resolving this case in favor of jurisdiction at this preliminary stage.

The authors of this brief wish to clarify the fact that the views expressed hereinbelow are theirs alone and not those of Princeton University, its officials, nor of any of the other alumni of that University.

The authors hereby express their thanks to Earl Coleman, Archivist, and Emily Bennett, Office of Public Information, of Princeton University for their assistance with respect to information regarding Madison's years at Princeton University.

SUMMARY OF ARGUMENT

1. Where the lower court purports to have found no case law controlling a controversy involving constitutional rights, which is the situation in the case at bar, the lower court is obliged to review the intent of the framers of the Constitution in deciding whether it has jurisdiction but failed to do so in this instance.

2. The New Jersey anti-endorsement statute, N.J.S.A. 19:34-52, protects the citizen and his right to participate in nominating candidates. This right, once prescribed by the state's legislature and

applied to primaries of races for the National Congress, is guaranteed to the citizen by Art.I, Sec.4, Cl.1 and to permit political parties to screen and endorse candidates denies each voter his or her right to vote for an otherwise duly qualified candidate for Congress in the manner so prescribed.

3. For the Court to fail to grant jurisdiction in this matter is to deny for all intents and purposes the right of voters in the State of New Jersey to participate in the electoral process which is so fundamental to the American political system, as expressed by James Madison and John Witherspoon.

ARGUMENT

1. It is always incumbent upon a lower court to consider intent of its framers in interpreting a law. A law remains a law until changed or revoked. Judicial history is always to be considered and for

a judge not to consider it is for the judge to shirk his judicial oath and responsibilities set forth in Art.VI, Cl.3 to uphold the Constitution. This is even more strongly the case where, as here, the "judicial" history is the history of the Constitution itself as the paramount law pursuant to the "Supremacy Clause" of Art. VI, Cl. 2.

In this instance where there is no exact case which the lower court was willing to consider as on point, the lower court was duty-bound to consider the intent of the framers of the Constitution. This particularly includes consideration of the pronouncements of James Madison as they bear on the interpretation of the issues raised. To leave this decision standing would be erroneous.

2. In reviewing and interpreting a New Jersey law <u>used to regulate a federal matter</u> we urge this Court to find

jurisdiction and to apply the checks and balances of the Federal law set forth in the Constitution, which is best explained in Madison's remarks to Monroe that:

> It was found impossible to fix the time, place and manner of election of representatives in the constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity and to prevent its own dissolution.
> ...
> Were they exclusively under the control of the state goernments, the general government might easily be dissolved. (emphasis added) Farrand, Records of the Federal Convention, Vol. 3, p. 311. Also see U.S. v. Gradwell, 243 U.S. 476, at 484

Whereas Thomas Jefferson favored explicit laws guaranteeing and detailing the rights of individual citizens of the new Republic, which is a reflection of his experience under the French Civil Code while in France following the War of Independence, James Madison favored the

establishment of institutions through federal law to serve as checks and balances on the states, disestablishing the states from an undue concentration of power or authority which would deny to the citizens those inherent rights which, in the view of both these men and all the other framers, they possessed. Nowhere was Madison more concerned about such an undue concentration of power than with respect to the guarantee of the right to vote for the members of the National Legislature as set out in Art.I. He saw the lack of such guarantee as the basis of the dissolution of the federal government as it was established by the framers in the Constitution. The National Congress was created by the Constitution and he well realized that without checks upon the power of the state and the "general" government, as he called it, to infringe upon that right, it would ultimately be

dissolved. He viewed this right clearly as a federal matter. Therefore, the allegation of infringement of this right is a federal matter, even though the statute protecting the right be a state enactment pursuant to Art.I, Sec.4, Cl.1.

The failure of the Court to recognize jurisdiction in this matter will, we submit, set the stage for the dissolution apprehended and forewarned against by James Madison should the courts of state government have exclusive jurisdiction over these matters.

3. To deny the right of a duly qualified candidate to appear on a primary ballot free of the stigma of not being endorsed where the state's legislature has forbidden such endorsement, is to deny all voters the chance to view such a candidate impartially and fairly as contemplated by the anti-endorsement law.

The net result of the New Jersey endorsement process by the Democratic Party officials in this case is to short circuit the entire voting process which the elected representatives of the legislature have prescribed. Whether by the endorsement process in the case at hand or other similar voting gimmicks and schemes recently before this Court, such as in the cases of Hopfmann v. Connolly, No. 85-1097, ___U.S.___, App. Den., Cert. Den., January 12, 1987 and Eu v. San Francisco Democratic Central Committee, No. 86-434 ___U.S.___, jurisdiction noted, decision of the lower court vacated and remanded to the 9th Circuit for decision in light of the recent decision of this Court in Tashjian v. Republican Party of the State of Connecticut, No. 85-766, ___U.S.___, dec. Dec. 10, 1986, (dec. in Eu also January 12, 1987,) the endorsement or prescreening process to date has never

permitted other names to appear on the ballot on an equal footing with the party favorite.

The system being questioned by this case raises issues similar to those found in Germany in the early 1930's. Moreover, in January of 1987, the Soviet Union, a state in which such party regulatory control has a status equal to and often superior to that of the legislative bodies, has questioned similar practices and procedures within its own party apparatus as being overly stifling and counter-productive to its national interests (See N.Y. Times, January 28, 1987, p.1) If the United States' form of government stands for anything it stands for the concept of determination along lines of "one person, one vote" and the concept that having "we the people" make decisions, acting through those whom we elect in fair and open contest, is better

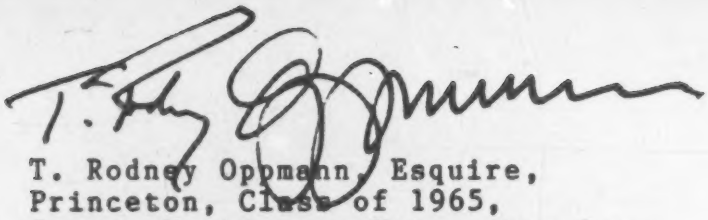
than regulatory decision-making by a limited number of largely unknown party officials who are not as representative of the popular will as legislators.

CONCLUSION

We submit that Madison intended the Art.I, Sec.4, Cl.1, "Times, Places and Manner Clause" as a check and balance clause precisely for a situation such as the case at hand and that his intent prevailed in the inclusion of that clause in the Constitution by its Framers and remains the law to this day. To fail to grant federal jurisdiction in this case would be to dishonor his efforts and the clear intent of the Framers of the Constitution in installing a most important bulwark against dissolution of the Federal Union.[1]

---

[1] In its decision in Tashjian, supra, a majority of this Court made it clear, (p.15, n.13) that a State has a right to confine each voter within a party to a single nominating act if it so desires. The New Jersey statutory scheme, as



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(Cont.)_____
interpreted by the New Jersey courts in the cases cited in appellants' jurisdictional statement, is clearly intended to do that. The effect of the systematic violation of the anti-endorsement law is to allow certain party members who attend the endorsing and screening convention to participate in more than a single such act. Moreover, this extra nominating act, being pursuant to a claimed First Amendment right, is beyond the purview of the legislature and thus violates this recent ruling of the Court. Unless the federal jurisdiction over the matter is recognized where congressional races are concerned, such violation of an acknowledged right of the States can also be a step enabling the dissolution of the Union warned against by Madison. For where the practice of evading the statute has been tolerated on the local level, access to the federal courts is a necessary concommitant to the reserved power in Congress to step in and regulate congressional elections when thought necessary in the national interest. In other words, federal judicial oversight is as necessary as federal legislative oversight in order to prevent the dissolution which was the root of the Framers' concern.

STATEMENT OF ASSENT TO FILING OF AMICUS CURIAE BRIEF

The Amici are informed that counsel for the parties have assented to the filing of this and other Amicus briefs.

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Brief of Amicus Curiae have been served upon all counsel named in the opening brief of appellants by service by United States Mail, First Class, postage prepaid, this 30th day of January, 1987, to wit: Laurence A. Elgin, Esq. 2762 Woodley Place, NW Washington, D.C. 20008; Joseph F. Shanahan, Esq., Box 105, RD 2, Lambertville, N.J. 08530; Donna Kelly-Boccher, Esq., Dep. A.G., Hughes Justice Complex, CN 112, Trenton, NJ; Lenin I. Fishman, Esq., 150 West State Street., Trenton, N.J., 08608; Barry D. Szaferman, Esq., 640 S. Broad St., Trenton, N.J., 08608; Walter R. Bliss, Jr., Esq., 126 Wall Street, Research Park, Princeton, N.J. 08540; John J. Hoagland, Esq., 303 George St., 3d Fl., New Brunswick, N.J. 08901; John C. Sahradnik, Esq., 212 Hooper Avenue, P.O. Box 757, Toms River, N.J. 08753.

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